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Agenda item 43
QUESTION OF CYPRUS

SECURITY COUNCIL
Forty-sixth year

Letter dated 13 June 1991 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

I have the honour to enclose herewith a letter dated 12 June 1991 addressed to you by His Excellency Osman Ertuğ, Representative of the Turkish Republic of Northern Cyprus (see annex).

I should be grateful if the text of the present letter and its annex would be circulated as a document of the General Assembly, under agenda item 43, and of the Security Council.

(Signed) Mustafa AKSIN
Ambassador
Permanent Representative

Annex

Letter dated 12 June 1991 from Mr. Osman Ertuğ
to the Secretary-General

At a time when the search for a federal solution to the question of Cyprus is entering a decisive phase, my Government has sought the legal opinion of two eminent jurists, Professor E. Lauterpacht and Mr. Monroe Leigh, on the critical issue of the sovereignty of the component states of the future federal state, for the purpose of clarifying the legal issues involved.

I have the honour to enclose herewith the text of this legal opinion in the hope that it will facilitate your efforts in the search for a solution within the context of your good offices mission in Cyprus (see appendix).

I should be grateful if the present letter and its annex were circulated as a document of the General Assembly, under agenda item 43, and of the Security Council.

(Signed) Osman ERTUĞ
Representative of the
Turkish Republic of Northern Cyprus

APPENDIX

Turkish Republic of Northern Cyprus Opinion

1. We have been asked to advise on certain questions regarding sovereignty in Cyprus and its relationship to proposals for a solution of the Cyprus problem along federal lines.

1. SOVEREIGNTY

2. The UN Security Council, in Resolution 649 (1990) of 12 March 1990, paragraph 1, reaffirmed its support for the 1977 and 1979 high level agreements between the leaders of the Greek Cypriot and Turkish Cypriot Communities

> in which they pledged themselves to establish a bi-communal Federal Republic of Cyprus that will safeguard its independence, sovereignty, territorial integrity and non-alignment, and exclude union in whole or in part with any other country and any form of partition or secession.

Paragraph 3 of the same Resolution called upon the leaders of the two Communities

> to pursue their efforts to reach freely a mutually acceptable solution providing for the establishment of a federation that will be bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects....

It is understood that both Communities adhere to this Resolution as a bass for negotiation.

3. The political question is how to achieve a federal system of which the details are acceptable to both sides. That is not a matter for this Opinion. The legal question is that of identifying the legal quality of each of the two Communities in the negotiations and in relation to the conceptual starting point for the construction of an effective federal system. That is the question that will first be considered here.

4. The circumstances of the present situation indicate quite clearly that the correct legal basis on which the two sides must approach the negotiations is that of equality of status, and, in particular, the possession of sovereignty in equal degree over the matters that are at present within the control of each Community. For this purpose sovereignty means the possession and exercise of real authority on an organized, orderly and continuing basis by those whom the populations of each area treat as their governments. A federal arrangement is one which by its nature involves a bringing together of the sovereignties of the component parts in association with a constitutionally controlled distribution of the powers of government between the federal and the communal components.

5. The justification for the acknowledgement of the sovereignty of each of the two Communities in Cyprus lies in the historical background to, and facts of, the present situation. Prior to 1878 Cyprus was under the legal and actual sovereignty of Turkey. From 1878 to 1914, sovereignty, though nominally Turkish, was actually exercised by Britain. In 1914 Britain annexed the island and in 1923, by Article 20 of the Treaty of Lausanne, Turkey

recognized that annexation. On the basis Britain acquired nominal in addition to actual sovereignty and retained it until 1960. Then, in implementation of the internationally agreed settlement reached in that year, Britain formally relinquished sovereignty over the Island of Cyprus in order to permit the establishment of "an independent sovereign Republic of Cyprus".

6. The circumstances in which Britain relinquished its sovereignty over Cyprus in 1960 should be borne in mind. The British Government had previously explicitly recognized that there were two national communities sharing the island and that "any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community, no less than the Greek Cypriot community, shall, in the special circumstances of Cyprus, be given freedom to decide for themselves their future status." 526 Parl. Deb., H.C. (5th ser.) 1267-68 (1956). Indeed, in order to preserve the rights of the Turkish Cypriot Community, the British Government stood ready to "include partition among the eventual options." Id.

7. Eventually, an international solution was developed between Britain, Greece, Turkey and representatives of the Greek Cypriot and Turkish Cypriot Communities. In the international agreements concluded, Britain effectively agreed to relinquish sovereignty over Cyprus in favor of the two communities in exchange for their commitment to form a single government along agreed constitutional lines. Greece and Turkey joined Britain in agreeing to guarantee the constitutional structure of the new Republic of Cyprus. Upon the signing of these international agreements and the passage of the Cyprus Act, sovereignty over Cyprus was in effect transferred from Britain to the Greek Cypriot and Turkish Cypriot Communities and through them to the Republic of Cyprus as constituted under the Constitution of 1960. The compelling evidence that the two Cypriot Communities were an essential link in conferring sovereignty on the Republic of Cyprus is provided by the fact that all the basic documents from 1959-1960 were signed or initialled by the representatives of the two Cypriot Communities on behalf of their respective Communities.

8. The Constitution of 1960 was totally and inseparably founded upon the existence and political partnership of the

Greek and Turkish Communities within Cyprus. They were treated as equal in every way except in size. Some constitutional consequences flowed from that disparity. In representative bodies (the Council of Ministers and the House of Representatives) numbers were distributed on a proportional basis; likewise in the Civil Service and the Armed Forces. Otherwise, in relation to most important posts, where the principal position was held by a member of one Community, the deputy position had to be held by a member of the other. In the Supreme Constitutional Court, however, the two Communities were equally represented. In other important operational aspects of the Constitution the political equality of the two Communities was also recognized. The leading article of the Constitution on the executive power (Article 46) declared that "the executive power is ensured by the President and the Vice-President of the Republic" and certain important powers were conferred upon the President and the Vice-President to be exercised "conjointly". Moreover, in the enumeration of such powers as might be exercised by each of these two principal officers separately, each of them was given the identical "right of final veto on decisions of the Council of Ministers concerning foreign affairs, defense or security".

9. In short, sovereignty devolved on Cyprus in 1960 through a joint exercise of self-determination by the two communities and reposed in them jointly. There was no basis on which it could be said that either of the two Communities was sovereign and the other was not or that one Community enjoyed sovereignty or legal control over the other.

10. This constitutional arrangement, aptly described as a "functional federation" of two distinct national and political communities that happened at that time to live interspersed, is not without parallel in international experience. In Belgium, for example, where the Flemish-speaking Community constitutes about 60% of the population and the French-speaking community about 40%, the Constitution stipulates that the cabinet must be equally divided among Flemish and French ministers and that certain laws cannot be passed without separate majority votes by each national group in each chamber of the legislature. See Articles 1, 38 bis and 86 bis of the Belgian Constitution. In addition, the Constitution guarantees to the Flemish, French, and German-speaking Communities the right to legislate separately on matters of personal status,

language, social life, and education. Article 59 bis, as amended in 1980 and 1988.

11. Beginning with the Greek Cypriot President's attempt in 1963 to amend the Constitution to eliminate the political equality of the Turkish Cypriot Community, the unity that should have marked the operation of the Constitution was broken. Upon the unilateral denunciation by the Greek Cypriot Community of the legal basis on which the joint exercise of sovereignty by the two communities in Cyprus was predicated, the Constitution of 1960 self-evidently ceased to be operative and the "Republic of Cyprus" as constituted by the two communities ceased to exist. From 1964 onwards the two communities developed increasingly separate political and economic administrations and settlements, a process which culminated in 1975 with the complete regrouping of the two Communities in Cyprus into two geographically and administratively separate areas, a situation which is reflected in the "Exchange of Populations Agreement" of 2 August 1975. This fundamental condition was recognized in 1974 by the Foreign Ministers of Britain, Greece and Turkey in their Geneva Declaration of 30 July in which they jointly called for "the reestablishment of

constitutional government in Cyprus" and "an immediate return to constitutional legitimacy." In doing so,

> The Ministers noted the existence in practice on the Republic of Cyprus of two autonomous administrations (-) that of the Greek Cypriot community and that of the Turkish Cypriot community.

12. The "Republic of Cyprus" being no longer constitutionally or factually able to exercise sovereignty over the whole island, sovereignty over the island was divided and thereafter reverted to the authority actually in control of each of the two territories: the Greek Cypriot Community in the south and the Turkish Cypriot Community in the north.

13. The fact that the Greek Cypriot Community in the south has continued to operate under the title "Republic of Cyprus" is no more than a matter of nomenclature; it does not and cannot accord the Greek Cypriot Community a sovereignty in the north which it does not have the power to exercise. Nor can any such sovereignty result from any

international recognition of the Greek Cypriot Community as the "Republic of Cyprus". Correspondingly, the presence of Turkish forces in the north does not deprive the Turkish Cypriot Community of the actual power and jurisdiction, amounting in effect to sovereignty, which it exercises, and has since 1974 continuously and without effective challenge exercised, there. The Government of Turkey recognizes the Turkish Cypriot Community in the north as the sovereign government of the area, does not claim for itself or exercise power in that area, and expressly denies that northern Cyprus is part of Turkey. The absence of general de Jure international recognition of the status of the Turkish Cypriot Community under the name of the Turkish Republic of Northern Cyprus cannot deprive that Community of the sovereignty which as an indisputable matter of fact, it exercises in Northern Cyprus - a situation that is reflected in the extensive de facto relations that foreign States maintain with that Community.

14. The reversion of sovereignty in Cyprus to the two communities is confirmed both by logic and by international experience. The experience of the Mali Federation is particularly instructive. In 1959, Senegal and Soudan were

semi-autonomous members of the French Community which agreed to seek independence and form a federation. Each colony negotiated individually with France for its independence and the eventual agreements on the transfer of sovereignty were signed by France, Senegal and Soudan; however, the formal proclamation of independence was issued by the federation of Mali. Thus, as in the case of Cyprus, the federation and its component entities achieved sovereignty at the same time.

15. In 1960 Senegal withdrew from the Mali Federation, on the grounds that breaches by Soudanese federal government officers of basic terms of the constitution had rendered the constitution legally worthless. By 1961, Soudan, (which changed its name to Mali) and Senegal held separate seats in the United Nations and had been recognized as independent states by France, the United States, and several other countries. Thus there is no international legal impediment to, and indeed there is precedent for, the community of nations to recognize the reversion of sovereignty to the Greek Cypriot and Turkish Cypriot Communities.

2. THE PROPOSALS OF THE TWO SIDES

16. The possession of sovereignty by each of the two Communities has a direct bearing on the manner in which the powers of the federal authority and of the two component federated States is approached. The current Greek Cypriot proposals contain a number of expressions suggestive of the view that the Constitution will allocate powers to the Communities rather than that the Communities will be delegating powers to the new constitutional authority. Thus, for example, under heading VI Constitutional Arrangements, in paragraph 1(a) (General), the Greek Cypriots propose that "the Republic will be Federally organized, with substantial powers being reserved to the constituents"; and paragraph 2(d) states that "there will be no possibility of Federal encroachment on the powers and functions of the Provinces. The latter will be constitutionally entrenched, the initial allocation (presumably to each Community) having been agreed by the two sides."

17. All the passages just emphasized reflect the view that the powers of government have some central (albeit innominate) source and are, therefore, the objects of grant

to the "Provinces". They may be compared with the approach to be found in the Turkish Cypriot proposals, e.g. those of 6-7 April 1989, which indicated, inter alia, that "residual powers will remain with the federated republics". The proposed Turkish Cypriot structure reflects the position which is most common in federal systems, namely, that powers flow from the constitutional components to the federal government and that the residue of unallocated powers remains in the constitutional components.

3. THE PREVALENT PRACTICE IN FEDERAL SYSTEMS

18. International law is, of course, not directly concerned with the distribution of power within a federal system, but it certainly does not contain any prohibition on the creation or recognition of federal states in which the residuum of power is in the constituent units. In this connection one may recall the position in a number of significant federal systems which are presented, simply for convenience, in alphabetical order.

(i) Argentina

The constitution of Argentina provides in Article 104 that "The Provinces retain all powers not delegated by the Constitution to the Federal Government and those expressly reserved by special covenants at the time of their incorporation."

(ii) Australia

The Commonwealth of Australia Constitution Act, section 107, preserves the legislative competence of State Parliaments in respect of any topic that is not exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. Article 107 provides:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the Case may be.

As stated in R. v. Phillips (1970) 125 CLR 93, "this is simply an expression of an element that is implicit in any federal system in which defined powers are granted to the central authority and the undefined residue remains with the constituent parts."

(iii) Austria

The Federal Constitution provides in Article 15 (1) that "Insofar as a matter is not expressly assigned by the Federal Constitution to the 'Bund' for legislation or also execution, it remains within the Lander's autonomous sphere of competence".

(iv) Brazil

The Federal Constitution of 1988, Article 25, provides: "States are organized and governed by the constitutions and the laws that they adopt, the principles of the Constitution being observed.

(I) Spheres of authority not forbidden to them by this Constitution are reserved to the States..."

(v) Federal Republic of Germany

Prior to unification, Article 30 of the Federal Constitution (Grundgesetz) provided (and still provides) that:

> The discharge of the State's duties and competences is within the domain of the Lander insofar as this Constitution does not allow or provide for a different regulation.

Article 79, paragraph 3, provides that any revision of the constitution which would touch upon the status of the Lander and their fundamental powers is prohibited. The German Federal Constitutional Court has stated that this guarantee protects the sovereignty of the Lander in a federal State are States in the legal sense only if they retain a nucleus of inherent competences of which they cannot be deprived". BVerfGE 34, 9(19f).

(vi) Malaysia

Schedule IX of the Federal Constitution contains lists of the exclusive powers of the Federal and State Governments respectively, as well as a Concurrent List. Article 77 of the Constitution provides that the residual power is retained by the States:

> The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

(vii) Mexico

Article 24 of the Federal Constitution provides that, "those competences that are not expressly conceded by this Constitution to the federal authorities are understood to be retained by the States".

(viii) Nigeria

Under the Federal Constitution of 1929, Chapter 1, Section 4, competences not listed in the list of exclusive powers of the Federal Government or of the concurrent powers of the Federal Government and the States are allocated to the States.

(ix) Pakistan

The 1973 Constitution of Pakistan, Article 142, provides that the residuum of power is in the Provinces.

(x) Switzerland

The Swiss Confederation was founded as a voluntary association of independent cantons which agreed to surrender certain of their sovereign powers to a federal government. Accordingly, the Federal Constitution, Article 3, provides that: "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution, and, as such, they exercise all rights which are not delegated to the federal power".

(xii) USA

The United States Constitution of 1787 was a compact reached between thirteen independent states. Reflecting this voluntary creation of a federal government by sovereign entities, the Tenth Amendment to the U.S. Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

(xiii) USSR

The relationship between the Union Government and the individual Republics has been newly regulated by a law of 26 April 1990 which declares that the Republics have all the powers not expressly delegated to the Union. Likewise the Draft Union Treaty of 9 March 1991 (not yet in force) declares that each Republic party to the Treaty is a sovereign state and that "the USSR is a sovereign federal state formed as a result of a voluntary association of equal

republics and exercising state power within the limits of the powers vested in it by the parties to the Treaty." Part I, I First. Article 5 provides that the republics parties to the treaty "invest" the USSR with specific enumerated powers which may only be changed with the consent of all the republics. Finally, Article 10 of the draft treaty provides that the laws of a republic take precedence on its territory on all questions except those specifically ascribed to the Union's jurisdiction.

(xiv) Venezuela

Article 17, 7, of the Venezuelan Constitution confers upon the states power over "anything which, in conformity with this Constitution, does not pertain to national or municipal jurisdiction."

19. Though there are exceptions (as in the cases of Canada and India), the constitutions of the significant majority of federal States can thus be seen to proceed on the basis that the powers of the central or federal government are derived from the component units; that the

latter retain the residual powers; and that their legal positions cannot be altered without their consent.

20. In the light of contemporary constitutional practice, it is obvious that the current proposals made by the Greek Cypriot Community (as outlined in paragraph 16 above), which strongly suggest that the grant of powers would flow from the federal sovereign to the federated States rather than vice versa, are inconsistent with the historical and factual position of the two communities as separate sovereign entities. Just as the two communities on Cyprus agreed upon the division of governmental powers between themselves in a functional federation under the 1960 Constitution, so, in the formulation of any new federal constitution, it is the two communities which contribute the powers of government and will determine the division of those powers between the federal and the territorial governments.

4. TREATY MAKING BY THE COMPONENT UNITS OF FEDERAL STATES

21. We have also been asked an ancillary question, namely, whether it is in accord with contemporary federal constitutional practice for the component units within federal systems to retain, at any rate in part, the right to carry on relations (including treaty-making) directly with foreign states. The answer is that there is nothing doctrinally impossible about this -- it being simply a matter of inserting appropriate wording in the constitutional arrangements or in subsequently securing appropriate federal authority should this power not previously have been retained.

22. The capacity of the component units of a federal State to conclude treaties was recognized by the International Law Commission of the United Nations in 1962. In the Draft Articles on the Law of Treaties prepared by the Commission in that year, Article 3(2) provided:

In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

The fact that this provision does not appear in the Vienna Convention on the Law of Treaties as finally adopted cannot be read as suggesting that the Commission eventually concluded that it was wrong in principle. The omission merely reflects a difference of opinion in the Commission as to whether it was necessary to cover this aspect of capacity in a codifying convention.

23. The following are among the principal illustrations:

(1) Federal Republic of Germany

Article 32 of the Basic Law provides that insofar as member States (Lander) are competent to legislate, they may, with the approval of the Federal Government, conclude treaties with foreign States on matters in which the Lander have exclusive or concurrent legislative competence. In the former category of cases the agreements must be approved by

the Federal Government; in the latter category, they need not be. In 1965 a concordat was signed between the Land of Lower Saxony and the Holy See. In 1961 a convention concerning the protection of Lake Constance from pollution was concluded between the land of Wuerttemberg-Baden, the free State of Bavaria, Austria and Switzerland. In addition, Rhineland-Palantinate has concluded three agreements with Luxembourg concerning dams on international rivers and the establishment of a common park.

(ii) Switzerland

Article 9 of the Federal Constitution of 1848 provides that:

> In special cases, the Cantons retain the right of concluding treaties with foreign Powers upon the subjects of public economic regulation. Cross-frontier intercourse, and police relations.

So long as those agreements

shall contain nothing repugnant to the confederation, or to the rights of the other cantons.

A great many such agreements have been made. For example, in 1874 Baden and Basle concluded an agreement providing for the establishment of a ferry and in 1908 Basle-Land and Aargan concluded an agreement with Baden for the establishment of a hydro-electric plant.

Since 1933, there have been seven cantonal agreements with foreign States. These agreements include double taxation treaties between Berne (1935), Neuchatol (1935), Aargau (1939) and France, and between Graubunden (1958) and Schaffhausen (1962) and Liechtenstein, agreements between Basel and the Bank or International Settlements (1932) and Geneva and the United Nations (1946) and an agreement between Schaffhausen and Baden (1947) on the distribution of electric energy.

(111) USA

Article 1, Section 10, clause 3 of the Constitution provides that states may enter into agreements or compacts

with a foreign power with the consent of Congress. Numerous federal laws expressly delegate treaty-making power to the states. See, for example, the United Nations Headquarters Agreement Resolution, 61 Stat. 756 (1947), section 203 of the Federal Civil Defense Act of 1950, 64 Stat. 1245, 1251 (1951); the Northeast Interstate Forest Fire Prevention Compact Act, 66 Stat. 71 (1952); and the International Bridge Act of 1972, 1972 U.S. Code of Cong. & Admin. News 847 (1972).

In addition, the Supreme Court has ruled by implication that a state may make some agreements with foreign governments without the consent of Congress, so long as they do not impinge upon the authority or the foreign relations powers of the United States, Virginia v. Tennessee, 148 U.S. 503, 519 (1893); Cuyler v. Adams, 449 U.S. 433 (1981). Accordingly, an agreement between two North Dakota municipalities acting pursuant to state authority and a Canadian municipality concerning an international drain was upheld by the North Dakota Supreme Court without Congressional approval, because it did not impinge on any federal powers, McHenry County V. Brady, 163 N.W. 540 (1917).

(iv) USSR

On 1 February 1944, the Soviet Union amended its constitution so that each Republic acquired "the right to enter into direct treaty relations with States, to conclude agreements with them, and to exchange diplomatic representatives with them". Subsequently, the Ukrainian S.S.R. and the Byelorussian S.S.A. each became separate Members of the United Nations and parties in their own name to many multilateral conventions. The draft Union Treaty of 11 March 1991 similarly provides:

> The republics are fully-fledged members of the international community. They are entitled to establish direct diplomatic, consular, trade, and other ties with foreign states, exchange official missions with them, conclude international treaties, and participate directly in the activity of international organizations without infringing the interests of the parties to the present treaty and their common interests or violating the USSR's international commitments.

24. Even in Canada, where the Canadian Constitution Act of 1982 places the residuum of power in the federal government and is silent on the treaty-making powers of the provinces, the provinces have in practice concluded -- with the implicit or explicit consent of the federal government -- a considerable number of international agreements both with U.S. states and foreign countries. For example, in 1965 Quebec and France signed an entente on cultural cooperation, to which the Canadian Government gave its consent. In 1970, the Canadian Government consented to the accession of the provinces of New Brunswick and Quebec to the Northeast Interstate Forest Fire Protection Compact along with the states of New Hampshire, Vermont, and Connecticut. T.I.A.S. No. 6825, 21 U.S.T. 415, 753 U.N.T.S. 46 (29 January 1970). Indeed, a 1974 study commissioned by the U.S. Department of State identified over 700 arrangements and agreements of varying degrees of formality concluded between Canadian provinces and U.S. states. See R. Swanson, State/Provincial Interaction: A Study of Relations Between U.S. States and Canadian Provinces (Canus Research Institute, August 1974).

25. It is therefore certainly commonplace under contemporary constitutional practice and not prohibited by

international law for the component units of a federal state to retain and exercise constitutional powers to conclude treaties and international agreements directly with foreign states.

5. SUMMARY

In short, our opinion is as follows:

(i) We consider that by reference to the facts the Turkish Cypriot Community participates in the negotiations with the Greek Cypriot Community as a sovereign entity and on a footing of complete equality. This means, in practical as well as conceptual terms, that the eventual division of powers between the federal government and the governments of the federated states will not represent a grant of powers by the federal government to the federated states nor will it involve any grant of powers by the Greek Cypriot Community to the Turkish Cypriot Community, or vice versa.

(ii) A federal solution which rests upon and acknowledges that the grant of powers is by the federated states to the federal government and that reserves to the

federated states any and all residual powers is in conformity with the predominant constitutional practice in federal systems.

(iii) So also would be an acknowledgement that each of the federated States may, in respect of specified classes of matter, retain the right to make treaties directly with foreign States.

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Monroe Leigh

31 May 1991

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LETTER DATED 13 JUNE 1991 FROM THE CHARGE D'AFFAIRES A.I. OF THE UNITED STATES MISSION TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

On behalf of the Unified Command established pursuant to Security Council resolution 84 (1950) of 7 July 1950, I have the honour to submit a report of the United Nations Command concerning the maintenance of the Armistice Agreement of 1953 during the period from 1 January to 31 December 1990. This report contains an appendix covering the interception of a North Korean infiltration tunnel in the demilitarized zone (DMZ), the North Korean barrier system in the DMZ, United Nations Command initiatives, and developments on the United Nations Command remains issue for the specified period.

I request that this letter, together with the enclosed report of the United Nations Command and the attached appendix, be circulated as a document of the Security Council.

(Signed) Alexander F. WATSON
Acting United States Representative

Enclosure

Report on the activities of the United Nations Command, 1990

I. UNITED NATIONS COMMAND AND ITS MISSION

1. United Nations Security Council resolution 83 (1950) of 27 June 1950 determined that the armed attack upon the Republic of Korea by the North Korean forces constituted a breach of peace and recommended that "the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area". In order to utilize better the various offers of assistance and to unify the military operations, the Security Council adopted resolution 84 (1950) of 7 July 1950, recommending that Member States make military forces and other assistance available to a unified command under the United States of America. Besides the United States, 15 other States Members of the United Nations subsequently provided military forces to the unified command, which was later named the United Nations Command (UNC). Security Council resolution 84 (1950) also requested that the United States designate the commander of UNC and provide the Security Council with reports as appropriate on the course of action taken under UNC. As a result of prompt and sustained collective action of the United Nations against the North Korean aggression, an armistice has been effected on a basis of United Nations objectives and principles. The Commander-in-Chief, UNC (CINCUNC) signed the 27 July 1953 Korean Armistice Agreement on behalf of all the forces of the 16 States Members of the United Nations and the Republic of Korea, which fought under the United Nations flag. Pursuant to paragraph 17 of the Armistice Agreement, all CINCUNC successors in command are responsible for compliance with the enforcement of the terms and provisions of the Armistice Agreement. UNC continues to carry out its functions and fulfil its obligations under the mandate of the Armistice Agreement. This includes enforcement of a complete cessation of all hostilities in Korea by all armed forces, and maintaining peace and security on the Korean peninsula until a more durable peace is achieved by the parties directly concerned - South and North Korea. Of the 16 States Members of the United Nations that provided military forces to UNC during the Korean War, eight are still represented in the United Nations Command today. They are Australia, Canada, Colombia, France, the Philippines, Thailand, the United Kingdom and the United States. Officers from these States Members of the United Nations not only participate in the meetings of the Military Armistice Commission (MAC), but also participate in multinational investigations of more serious Armistice violations, such as was the case in the North Korean illegal infiltration tunnel in the demilitarized zone (DMZ), which was intercepted in March 1990. In view of the continued North Korean threat to international peace and stability in the region and significant Armistice-related issues before the Commission, UNC considers it appropriate to submit the present report to the United Nations Security Council as requested by Security Council resolution 84 (1950).

II. ARMISTICE MECHANISM AND PROCEDURES

2. The Korean Armistice Agreement, a purely military agreement between the opposing military commanders, is to ensure a complete cessation of all hostilities in Korea by all armed forces of the opposing sides until an enduring bilateral peace-keeping mechanism is established by the two parts of Korea with an ultimate goal of achieving peaceful reunification of Korea. No individual nation or Government is a signatory to the Armistice Agreement. CINCUNC signed the Armistice Agreement on behalf of the entire military forces under the unified command, consisting of the forces from 16 States Members of the United Nations, as well as the Republic of Korea. The Commanders of the Korean People's Army (KPA) and the Chinese People's Volunteers (CPV) signed the Agreement on behalf of the KPA/CPV forces.

A. Military Armistice Commission

3. The general mission of MAC in Korea, as established in accordance with the Armistice Agreement, is "to supervise the implementation of this Armistice Agreement and to settle through negotiations any violations of this Armistice Agreement". The Commission is a joint organization and is composed of 10 military members: 5 senior officers from UNC and 5 senior officers from KPA/CPV. CINCUNC has appointed one member from the United States, two from the Republic of Korea, one from the United Kingdom and one designated on a rotational basis from among the other United Nations Member nations represented in UNC by representatives of the rank of Colonel (currently Canada, Colombia, France, the Philippines and Thailand). MAC meetings are held at the request of either side in the Joint Security Area, more commonly known as Panmunjom, in the DMZ. To assist MAC in fulfilling its functions, the Armistice Agreement provides for a joint secretariat to maintain 24-hour telephone communications between the joint duty officers of each side located in the Joint Security Area. The joint duty officers also meet daily, except Sundays and holidays, and serve as the basic channel of communications between the two opposing sides. There have been 458 plenary sessions of MAC and 503 meetings of the MAC Secretaries since the Armistice Agreement was signed. MAC, or the Senior Member of either side, is authorized by paragraph 27 of the Armistice Agreement to dispatch joint observer teams to investigate reported violations of the Armistice Agreement that occur within the DMZ. KPA and CPV, however, have frustrated this important investigative function by refusing to participate in more than 170 joint investigations proposed by UNC since April 1967.

B. Neutral Nations Supervisory Commission

4. The Neutral Nations Supervisory Commission (NNSC), as established in accordance with the Armistice Agreement, is composed of delegations from Sweden, Switzerland, Czechoslovakia and Poland, respectively. The term "neutral nations" in the Armistice Agreement is defined as nations whose combatant forces did not participate in the Korean War. The primary function

of NNSC is to conduct independent inspections and investigations of Armistice-related developments and violations outside the DMZ and to report its findings to MAC. Although its basic mission and function of inspection and investigation has been almost completely curtailed owing to KPA/CPV obstruction, NNSC does provide a useful and stabilizing influence in the Joint Security Area, as well as a means for indirect communication between the two opposing sides of MAC. NNSC holds weekly meetings at Panmunjom.

C. Role of the Republic of Korea

5. A unique feature of the Korean Armistice Agreement is that no nation or Government is a signatory to the Agreement. CINCUNC signed the Armistice Agreement on behalf of the unified command, consisting of the military forces from 16 United Nations Member nations and the Republic of Korea. During the Armistice negotiations and afterwards, at the request of the KPA/CPV side, the Government of the Republic of Korea, through UNC, furnished assurances that it would abide by the Armistice Agreement. Today, the Republic of Korea provides almost all of the "DMZ police" force that maintains security and order in the UNC portion of the DMZ in compliance with the Armistice Agreement. In addition, Republic of Korea senior military officers have served on MAC as UNC members over the last 37 years.

III. UNITED NATIONS COMMAND MILITARY ARMISTICE COMMISSION ACTIVITIES

6. MAC meetings are normally called to discuss serious violations of the Armistice Agreement and other significant Armistice-related issues. These meetings, as well as 24-hour telephone communications facilities between the two sides, serve to prevent further escalation of military tension from accidental incidents and possible misunderstanding. Serious charges of Armistice violations are passed telephonically through the Joint Duty Office at Panmunjom. This provides the other side an opportunity to stop ongoing violations. The Commission is a proven means of essential communication between the opposing military commanders, as demonstrated by its continued use by both sides.

7. Six MAC meetings were held during 1990. The more serious KPA/CPV violations of the Armistice Agreement during the period are set out in the appendix to the present report. Six MAC Secretaries meetings were held during 1990. Five North Korean drowning victims as well as one Republic of Korea drowning victim were returned through six MAC Secretaries meetings. The North Korean side has continued to misuse the MAC as a forum for disseminating distorted political propaganda and for presenting non-Armistice-related political overtures clearly outside the purview of MAC, thereby subverting the true purpose of the Commission and converting it into a propaganda forum.

8. During 1990, KPA/CPV reiterated its usual demand that UNC cease its annual training exercise "Team Spirit", despite the fact that the Armistice

Agreement does not address military training exercises; they also presented political proposals clearly outside the purview of the MAC, such as establishment of a nuclear-free zone in Korea and (North Korea/United States/Republic of Korea) tripartite talks to conclude a peace treaty. However, UNC continued its search for measures, acceptable to both sides, which would help build mutual confidence, thereby easing military tension on the Korean peninsula. The most noteworthy are proposals for mutual prior notification of major military exercises and exchange of observers. UNC has taken unilateral actions in this regard for the past nine years by notifying the North Koreans of its annual training exercise "Team Spirit" and extending the Republic of Korea Government invitations to North Korean and Chinese military officers to come and observe these training exercises. UNC has extended invitations to NNSC members to come and observe these exercises. Unfortunately, the North Koreans rejected these invitations, while expressing their concern that these exercises are offensive in nature and are liable to lead to actual war. (The appendix to the present report discusses in detail more serious KPA/CPV violations of the Armistice Agreement, as well as specific UNC confidence-building measures designed to reduce military tensions.)

IV. CONCLUSIONS

9. For more than 36 years, MAC has served as the only official channel of communication between the opposing military commanders in Korea. Its most positive aspect is that it is still operative and used by the two opposing military commanders to defuse serious incidents, prevent misunderstandings, and avoid the resumption of hostilities in Korea. The opposing military commanders, however, have no mandate to resolve political issues, such as the question of the withdrawal of foreign forces from Korea or turning the Korean Armistice Agreement into a peace treaty. On the other hand, the Republic of Korea and North Korea have yet to make a real breakthrough at the inter-Korea political dialogue in achieving a substantial progress towards a political settlement of the Korean question. None the less, it is these bilateral talks that provide the hope for eventual reunification of Korea through peaceful means. While not involved in the actual dialogue or negotiations, UNC has provided all possible administrative and security assistance to these talks and contacts held in the Joint Security Area, Panmunjom. In the meantime, UNC will continue to perform its important peace-keeping role in the Republic of Korea, particularly in maintaining the Armistice, until an effective and enduring mechanism is established through political dialogue between the two parties directly concerned - the two parts of Korea.

Appendix

Major incidents/issues discussed at the Military Armistice Commission (1 January-31 December 1990)

1. North Korean infiltration tunnel in the DMZ

1. On 3 March 1990, an illegal North Korean infiltration tunnel, the fourth one, constructed across the Military Demarcation Line under the DMZ was intercepted by the UNC/Republic of Korea countershaft at 38 19'10" North latitude and 128 06'50" East longitude. Apparently, the entrance to the tunnel is within the North Korean portion of the DMZ. The tunnel, dug through solid granite, is about 2 metres high and 2 metres wide, and more than 145 metres below the surface. It extends over 1,000 metres into the UNC portion of the DMZ. This is the fourth time that North Korea has been exposed constructing illegal infiltration tunnels under the DMZ, in violation of paragraphs 1, 6, 13a, 14 and 17 of the Armistice Agreement. (Note: for the North Korean infiltration tunnels Nos. 1 and 2 discovered in 1974 and 1975, refer to the 1975 UNC report to the Security Council (S/11861); and for the North Korean infiltration tunnel No. 3 discovered in 1978, refer to the 1979 UNC report to the Security Council (S/13113).)

2. On three separate occasions, UNC proposed that a Joint Observer Team, composed of UNC and Korean People's Army/Chinese People's Volunteers members, jointly investigate the fourth North Korean infiltration tunnel, as provided for by paragraphs 26 and 27 of the Armistice Agreement. UNC proposals for a joint investigation were completely ignored by the North Korean side, however. UNC, at the 455th MAC meeting, on 14 March 1990, charged the North Koreans with this serious violation of the Armistice Agreement, and presented compelling evidence against the North Koreans that had been gathered by a UNC multinational investigative team. The North Korean Senior Member not only refused to conduct a joint investigation of the fourth North Korean infiltration tunnel by a Joint Observer Team - an investigative arm of MAC, but insisted on conducting a unilateral investigation of the North Korean infiltration tunnel by a North Korean "investigation team". The North Koreans know that if a joint investigation of the North Korean infiltration tunnel is conducted by a Joint Observer Team they will have to open up the North Korean portion of the DMZ for reciprocal joint investigations, which will lead to the discovery of the tunnel's entrance. The North Koreans continue to reject a Joint Observer Team investigation of the tunnel.

2. North Korean barrier system in the DMZ

3. At the 453rd meeting of MAC, on 17 January 1990, UNC charged North Korea with constructing an extensive illegal barrier system in the North Korean portion of the DMZ in a gross violation of paragraph 13a of the Armistice Agreement. The existing barrier system stretches more than 140 kilometres throughout the DMZ and incorporates electrified fences, barbed-wire fences, anti-tank barriers and fortified positions. UNC displayed at the meeting many

recent photographs, showing the illegal North Korean barrier system. UNC pointed out a misleading remark made by the North Korean Supreme Commander that "there is no barrier except for barbed wires which mark a boundary" in the North Korean portion of the DMZ. UNC also pointed out that KPA efforts have been to mislead the world public into thinking that the Republic of Korea built the so-called concrete walls in the DMZ to block south-north exchanges. These "concrete-walls" are actually defensive tank barriers, and are well outside the DMZ. They have nothing to do with the Armistice Agreement.

3. United Nations Command initiatives

4. Despite the continuing North Korean threat and their use of MAC for distorted political propaganda purposes, UNC continues to approach meetings of MAC and its subordinate agencies in the positive manner intended by the Armistice Agreement. UNC has proposed a number of confidence-building measures that would assist in reducing military tensions if taken seriously by the North Koreans.

(a) Restoration of the Joint Observer Team function

5. Paragraph 27 of the Korean Armistice Agreement stipulates that: "The Military Armistice Commission or the Senior Member of either side thereof is authorized to dispatch Joint Observer Teams to investigate violations of this Armistice Agreement in the Demilitarized Zone ...". Paragraph 24 of the Armistice Agreement stipulates, in part, that the general mission of MAC "shall be to settle through negotiations any violations of this Armistice Agreement". The Joint Observer Teams clearly constitute an investigative arm of MAC. Records of the Commission show that since 1966 UNC proposed the dispatch of Joint Observer Teams on 130 occasions to investigate serious North Korean armistice violations. These violations included armed attacks, intrusions across the Military Demarcation Line, and the construction of illegal infiltration tunnels under the DMZ. On every occasion except one, in 1967, North Korea refused or failed to participate in Joint Observer Team investigations proposed by UNC. For example, North Korea refused to participate in a Joint Observer Team investigation of the fourth illegal North Korean infiltration tunnel discovered in the DMZ on 3 March 1990.

6. Throughout 1990, the Senior Member of UNCMAC addressed important Armistice-related confidence-building measures. They included restoration of the Joint Observer Team to investigate serious Armistice violations, prior notification and observation of exercises, removal of propaganda signs in the DMZ, returning the DMZ to a true buffer zone and establishment of a viable verification system for Armistice compliance in both the DMZ and the Joint Security Area, Panmunjom. At every MAC meeting held during 1990, the Senior Member, UNCMAC repeatedly called upon the North Korean side to take actions to reduce military tension by responding to UNC confidence-building measures as outlined above.

(b) Prior notification of and invitation to observe major training exercises

7. Contrary to North Korean accusations, military training exercises per se are not addressed by the Armistice Agreement and, therefore, cannot constitute a violation of that Agreement. In contrast, however, secret exercises, such as those routinely conducted by North Korea, cause genuine concern. The UNC has repeatedly proposed mutual prior notification of major military training exercises and the exchange of observers to preclude possible misunderstandings. To demonstrate its good faith, UNC provided a prior notification to North Korea on 10 January 1990 that United States/Republic of Korea joint military exercise "Team Spirit 90" would be conducted for about two weeks beginning in mid-March 1990. At the same time, the Government of the Republic of Korea invited North Korean and Chinese military representatives to come and observe the exercise for themselves, to illustrate that it does not pose a threat to North Korea or heighten tensions on the Korean peninsula. At the same time the Senior Member of UNCMAC invited the NNSC members to come and observe the exercise. At the 453rd MAC meeting, on 17 January 1990, UNC referred to Republic of Korea President Roh's 10 January 1990 speech about reducing the scale of the exercise Team Spirit-90 and inviting North Korean and Chinese observers as well as the four members of NNSC to come and observe the exercise. UNC pointed out that military forces throughout the world regularly conduct training exercises. UNC displayed a chart showing North Korean exercises as well as joint North Korea-Union of Soviet Socialist Republics exercises, and again reminded them that there is nothing in the Armistice Agreement about training exercises and, furthermore, that the UNC annual training exercise "Team Spirit", being conducted for the fifteenth consecutive year, well south of the DMZ, poses absolutely no threat to North Korea. North Korea again rejected the Republic of Korean Government invitation to come and observe the training exercise. North Korea's continued military build-up, forward deployment of offensively oriented forces, and secret major military manoeuvres all directed against the Republic of Korea, cause serious concern that North Korea may be preparing for another act of armed aggression - all of which serves to make the United States and the Republic of Korean training exercise even more important as a deterrent to war.

(c) Joint Security Area (Panmunjom) security negotiations

8. Since November 1987, MAC Secretary-level informal staff officer talks have been conducted as a means to facilitate discussions and search for ways to improve security arrangements in the Joint Security Area, Panmunjom. Four such meetings were held during 1990, with the last session on 6 September 1990. These sessions have focused on four items that both sides have agreed to try to implement: eliminating all military facilities and guard posts from the Joint Security Area; removing heavy and automatic weapons from the Joint Security Area; reducing, disarming and controlling the guard forces; and inspections and verifications. So far, North Korean intransigence on an inspection and verification system has stymied progress. These informal discussions are expected to continue.

4. UNC remains issue

9. Paragraph 20 of the "Understanding" on the return of Korean War military remains - a 1954 subsequent agreement - stipulates "in the event that either side discovers in its territory bodies of military personnel belonging to the other side after the termination of this understanding, the delivery and reception of such bodies shall be arranged through the Secretaries of both sides of MAC". Each side is, therefore, legally obligated to return all military remains that are discovered in accordance with the agreement.

10. Although North Korea publicly admitted that it had the remains of several UNC (United States) soldiers in its possession, it did not deliver these remains through the Secretaries of MAC, in complete disregard of its obligations under the subsequent agreement cited above. UNC has maintained that the return of the UNC Korean War remains is not only required by the Armistice Agreement, but also is a humanitarian act on the part of North Korea.

11. Then, on 28 May 1990, a Democratic People's Republic of Korea Supreme Assembly delegation returned several sets of United States Korean War remains and effects to a United States congressional delegation in the Joint Security Area, Panmunjom. North Korea has been pressing for United States/Democratic People's Republic of Korea contacts on the United States remains issue for some time. North Korea is not interested in returning remains via MAC, but, rather, in using United States remains to increase its political contacts in the United States.

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S/22706
14 June 1991

ORIGINAL: ENGLISH

LETTER DATED 14 JUNE 1991 FROM THE PERMANENT REPRESENTATIVE OF THE ISLAMIC REPUBLIC OF IRAN TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

Upon instructions from my Government, and with reference to the letter of Iraq's Permanent Representative contained in Security Council document S/22502, I have the honour to make the following observation.

The Islamic Republic of Iran condemned all attacks against civilian populations in the allied war against Iraq as a matter of legal and moral principle. It further underlined the need to respect the sanctity of religious shrines in Iraq. During the war, Iraqi officials always applauded this position of principle which Iran had adopted and actively pursued.

On the basis of the same principle the Islamic Republic of Iran could not have turned a blind eye to the plight of the Iraqi civilian population caused by the Iraqi army which resulted in the exodus of 1.4 million Iraqi civilians into Iran and about 500,000 others into Turkey on the one hand and desecration of the sacred shrines on the other. Therefore the statement of the esteemed leader of the Islamic Republic of Iran on 5 April 1991, was not an interference in the internal affairs of Iraq, but fulfilment of an Islamic and international responsibility, as seen in similar statements of abhorrence and condemnation by many other leaders throughout the world. Despite the universality of such condemnation the Government of Iraq chose to renew its propaganda war against the Islamic Republic of Iran. Iraq's state-run press and news agency began to be filled with insult against the leadership of the Islamic Republic of Iran while Iraq's military increased its violations at the borders just like the days preceding its aggression against the Islamic Republic of Iran on 22 September 1980.

The Islamic Republic of Iran warns the Government of Iraq against the age old technique of creating external conflict for resolving internal problems.

It would be highly appreciated if this letter were circulated as a document of the Security Council.

(Signed) Kamal KHARRAZI
Ambassador
Permanent Representative

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S/22707
14 June 1991

ORIGINAL: ENGLISH

REPORT BY THE SECRETARY-GENERAL CONCERNING THE CREDENTIALS OF THE DEPUTY REPRESENTATIVE OF THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE SECURITY COUNCIL

Pursuant to rule 15 of the provisional rules of procedure of the Security Council, the Secretary-General wishes to report that he has received a letter dated 13 June 1991 from the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations stating that Mr. Vasiliy S. Sidorov has been appointed deputy representative of the USSR on the Security Council.

In the opinion of the Secretary-General, this letter constitutes adequate provisional credentials.

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S/22708
17 June 1991
ENGLISH
ORIGINAL: FRENCH

LETTER DATED 14 JUNE 1991 FROM THE CHARGE D'AFFAIRES A.I.
OF THE MISSION OF CANADA TO THE UNITED NATIONS ADDRESSED
TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to inform you that the Government of Canada supports the Republic of Korea in its wish to become a Member of the United Nations, as stated in its memorandum of 5 April 1991 (S/22455).

The Government of Canada is of the view that the Republic of Korea, a peaceful country which maintains a broad network of diplomatic relations, will make a valuable contribution to the attainment of the purposes and principles of the United Nations.

Canada's support for the application for membership by the Republic of Korea originates in its attachment to the Charter of the United Nations, and is also based on the principle of universal membership in the Organization. In this connection Canada welcomes the recent announcement by the Democratic People's Republic of Korea of its intention to join the ranks of the United Nations.

(Signed) Philippe KIRSCH, Q.C.
Chargé d'affaires a.i.

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